1999

State of Utah v. Eric Samuel Taylor : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	Case No. 990753-CA
ERIC SAMUEL TAYLOR,	:	Priority No. 2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM A CONDITIONAL PLEA OF GUILTY TO ONE COUNT OF POSSESSION OF A CONTROLLED SUBSTANCE (MARIJUANA) WITH INTENT TO DISTRIBUTE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8(1)(a) (1996), IN THE SEVENTH JUDICIAL DISTRICT COURT IN AND FOR GRAND COUNTY, THE HONORABLE LYLE R. ANDERSON, PRESIDING

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conditional plea of guilty to one count of possession of a controlled substance (marijuana) with intent to distribute, a third degree felony. This Court has jurisdiction over the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(e)(1996).

STATEMENT OF THE ISSUES ON APPEAL AND STANDARDS OF APPELLATE REVIEW

1. Was defendant seized within the meaning of the Fourth Amendment when he answered questions posed by an officer after the officer had stopped defendant's vehicle, issued a warning citation, and returned his documentation without any conduct indicating that defendant was not free to go?

Whether a defendant is constitutionally seized presents a question of law, reviewed nondeferentially for correctness, but with a "measure of discretion to the trial judge." State v.

Pena, 869 P.2d 932, 939 (Utah 1994).

2. Does defendant's attenuation analysis apply to a consent to search given during a consensual encounter with no prior police illegality?

Whether a principle of law applies to a given set of facts presents a legal question, reviewed for correctness. Wilde v. Wilde, 969 P.2d 438, 442 (Utah App. 1998).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

STATEMENT OF THE CASE

After a Utah Highway Patrol officer discovered close to nine pounds of marijuana in the car defendant was driving, defendant was charged with one count of possession of a controlled substance with intent to distribute (R. 1). Defendant filed a motion to suppress the evidence (R. 8). Following a preliminary hearing, the magistrate bound defendant over for trial and accepted his plea of not guilty (R. 9, 39: 13). Based on the evidence adduced at the preliminary hearing, the court denied

defendant's suppression motion (R. 11-14 or addendum A). Defendant entered a conditional guilty plea, and the court sentenced him to zero-to-five years in the Utah State Prison (R. 15-22, 28-29). This timely appeal followed (R. 30-31).

STATEMENT OF THE FACTS

Utah Highway Patrol trooper Steve Salas was patrolling along I-70 when he saw defendant approach from the opposite direction in a red 1999 Pontiac Grand Am with no front license plate (R. 39: 3-4). As the car passed by, Salas saw that the vehicle bore a Nevada rear plate. Knowing that Nevada required front plates, Officer Salas effectuated a traffic stop (Id.).

As Officer Salas approached the stopped vehicle, he noticed a two inch square, white velvet bag on the back dashboard. He then noticed another such bag hanging from the front mirror (Id. at 4). When defendant rolled down his window, Salas "noticed a fragrance, strong odor [sic] coming from the vehicle, like a perfume or air freshener, something of that sort" (Id.). When Officer Salas told defendant about the missing license plate, defendant immediately wanted to see where it should have been. The pair walked to the front of the car, where defendant suggested that "it may have fallen off or somebody may have stolen the plate" (Id.). The officer then asked defendant to get back into the vehicle (Id. at 5). Officer Salas noticed that defendant had a pager attached to his belt (Id. at 6).

Officer Salas then asked defendant for his driver's license, registration, and insurance certificate (Id.). When Salas saw that defendant had a Massachusetts driver's license, he asked if defendant had purchased the car in Nevada. Defendant answered that he had rented the vehicle in Nevada. In response to further inquiries, defendant told the officer that he was on business in Nevada and that he was in computer sales. Officer Salas testified that he "asked him what kind of computers did he sell and he told me Microsoft and stuff like that" (Id.). Salas elaborated: "When that was his response[,] that struck me kind of funny since Microsoft isn't a computer, it's a software. I had to ask people that question before [sic] and they're detailed in the type of computers that they sell. They usually know what they sell" (Id.).

Officer Salas returned to his vehicle, ran a license and warrants check, and found everything in order (Id.). He then wrote out a warning for the missing front license plate, walked back to defendant's car, and returned all of defendant's documentation (Id. at 6).

After the officer had issued the warning citation and returned all of defendant's papers, he asked defendant more questions, and defendant answered them (Id. at 6-7). Ultimately, the officer asked for consent to search the vehicle, which defendant granted (Id. at 7). In searching a black bag located

in the trunk, Officer Salas found a gift-wrapped package, which defendant gave him permission to open (Id. at 8). Inside was approximately nine pounds of marijuana (Id. at 8, 9).

SUMMARY OF ARGUMENT

Defendant first argues that the officer exceeded the constitutional scope of the traffic stop by questioning him on matters unrelated to the stop, after a warrants and license check had come back clean and after the officer had issued a warning citation. This argument fails because, when the officer issued the warning citation and returned defendant's documentation without any coercive show of authority, the seizure prompted by the original traffic stop de-escalated into a consensual encounter. Any further conversation between the two, therefore, was not subject to the protections of the Fourth Amendment.

Defendant next contends that his consent to search was invalid because it was the product of an illegal police detention and was not attenuated from it. However, because the seizure ended when the officer returned defendant's documents, the subsequent conversation, which included defendant's consent to search, was consensual in nature. Consequently, because there was no police illegality, there was nothing from which to attenuate defendant's consent.

ARGUMENT

POINT ONE

AFTER THE OFFICER COMPLETED THE PURPOSE OF THE TRAFFIC STOP BY ISSUING A WARNING CITATION AND RETURNING DEFENDANT'S DOCUMENTS WITHOUT ANY COERCIVE SHOW OF AUTHORITY, DEFENDANT WAS NO LONGER SEIZED FOR FOURTH AMENDMENT PURPOSES; CONSEQUENTLY, THE SUBSEQUENT EXCHANGE BETWEEN THE TWO WAS CONSENSUAL AS A MATTER OF LAW

Defendant argues that Officer Salas exceeded the permissible scope of the traffic stop and thus violated his Fourth Amendment right to be free from an unreasonable search and seizure when, after issuing a warning citation and without articulable suspicion of other wrongdoing, he questioned defendant about matters unrelated to his missing front license plate (Br. of App. at 7-8). Consequently, defendant asserts that the marijuana ultimately seized by the officer should have been suppressed (Id. at 6, 14).

The trial court, in denying defendant's suppression motion, determined that after the officer checked defendant's driver's license, four factors provided reasonable suspicion to continue the detention. The trial court cited the following factors as supportive of the officer's reasonable suspicion: 1) the driver, not from Nevada, was driving a Nevada rental car; 2) the driver said he sold Microsoft computers; 3) the officer saw white velvet bags on the rear dash and front mirror; and 4) the vehicle smelled strongly of air freshener or perfume (R. 12 or addendum

A).

In the State's view, the dispositive inquiry is not whether Officer Salas had sufficient reasonable suspicion of further criminal activity to justify expanding the scope of the stop or continuing the detention.[1] Rather, the case analytically turns on the point in time at which defendant was no longer seized for Fourth Amendment purposes. At that juncture, the interchange between defendant and the officer became consensual in nature and thus beyond the ambit of the Fourth Amendment. The trial court's denial of defendant's suppression motion should be sustained on this analytically sound alternative ground. See Debry v. Noble, 889 P.2d 428, 444 (Utah 1995)(affirming on alternative grounds); State v. S.V., 906 P.2d 913, 917 (Utah App. 1995)(same).

Not every encounter between the police and a citizen constitutes a seizure within the Fourth Amendment. Indeed, both federal and state courts have recognized three categories of constitutionally permitted police-citizen encounters:

> (1)an officer may approach a citizen at anytime [sic] and pose questions so long as the citizen is not detained against his will; (2) an officer may seize a person if the officer has an "articulable suspicion" that

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[1] The officer's initial detention must, of course, also be "justified at its inception." Terry v. Ohio, 392 U.S. 1, 19-20 (1968). In this case, however, defendant raised neither the propriety of the initial stop before the trial court nor plain error or exceptional circumstances on appeal. Consequently, the propriety of the initial stop is not at issue here. State v. Brown, 856 P.2d 358, 363 (Utah App. 1993).

> the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"; (3) an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed.

State v. Deitman, 739 P.2d 616, 617-18 (Utah 1987)(quoting United States v. Merritt, 736 F.2d 223, 230 (5th Cir. 1984)(citation omitted)). These categories are not static. Thus, a level one consensual encounter can escalate into a level two seizure or a level three arrest, or vice versa. See United States v. Shareef, 100 F.3d 1491, 1500 (10th Cir. 1996)(explaining relationship between levels of police-citizen encounters). Only the second and third levels, however, implicate the protections of the Fourth Amendment. See, e.g., State v. Struhs, 940 P.2d 1225, 1227 (Utah App. 1997).

In the context of a traffic stop, "[a] person is seized under the Fourth Amendment when, considering the totality of the circumstances, the police conduct would have communicated to a reasonable person that the person was not free to decline the officer's requests or otherwise terminate the encounter and go about his or her business." State v. Higgins, 884 P.2d 1242, 1244 (Utah 1994)(citing, inter alia, United States v. Mendenhall, 446 U.S. 544, 554 (1980)). And, once an individual is seized, for the seizure to end, it must be clear to the seized person, either from the words of an officer or from the clear import of

the circumstances, that the person is at liberty to go about his or her business. Higgins, 884 P.2d at 1244 (citing United States v. Sandoval, 29 F.3d 537, 540-41 (10th Cir. 1994)).

In determining whether a detainee is free to go, courts look to several circumstances. The return of a detained driver's documents signals one line of demarcation. Thus, federal courts "have consistently concluded that an officer must return a driver's documentation before a detention can end." United States v. Elliot, 107 F.3d 810, 814 (10th Cir. 1997)(citing United States v. Gregory, 79 F.3d 973, 979 (10th Cir. 1996) and United States v. Werking, 915 F.2d 1404, 1404 (10th Cir. 1990)). That action, however, will not necessarily render any subsequent interchange consensual "if the driver has objectively reasonable cause to believe that he or she is not free to leave." Shareef, 100 F.3d at 1501 (citing United States v. Turner, 928 F.2d 956, 959 (10th Cir.), cert. denied 502 U.S. 881 (1991)); accord Elliot, 107 F.3d at 814 (and cases cited therein).

In evaluating the objective reasonableness of the circumstances facing a detainee, courts look especially to the conduct of the police towards the detainee:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request

might be compelled.

United States v. Mendenhall, 446 U.S. at 555 (citations omitted); accord State v. Anderson, 114 F.3d 1059, 1064 (10th Cir. 1997); Turner, 928 F.2d at 959.

Notably, however, the police need not explicitly tell the detainee that he or she is free to go in order for a seizure to de-escalate into a consensual encounter. Ohio v. Robinette, 519 U.S. 33, 36 (1996). Thus, in Robinette, an officer stopped defendant along an interstate highway for speeding, asked him for his driver's license and registration, and ran a computer check. The check came back clear. The officer then asked defendant to get out of his vehicle. Defendant did so. The officer turned on his mounted video camera, issued a verbal warning to defendant, and returned his license. Id. at 35. With the video camera still running, the officer then asked, "One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" Defendant answered "no" and then, subsequently, in response to the officer's request, gave permission to search the car, in which the officer found marijuana. Id. at 35-36.

Under these factual circumstances, the Court upheld the voluntariness of defendant's consent, opining that "it would be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed

voluntary." Id. at 40. Thus, Robinette rejects a bright-line rule that a detention pursuant to a traffic stop cannot become consensual until an officer has explicitly told a detainee he is free to leave.

An objective look at the totality of the circumstances here compels the conclusion that defendant was objectively free to go even though, as in Robinette, the officer did not explicitly so inform him. Officer Salas had issued a warning to defendant and had returned all of defendant's personal papers to him, just as in Robinette. In Robinette, however, several other indicia of police control remained that are notably absent in this case. First, the officer had asked Robinette to get out of his car, thus separating him from his means of freely leaving the scene (Id. at 35). Second, the officer turned on his video camera, thus reasonably indicating to Robinette that he was the focus of the ongoing recorded encounter (Id.). And, finally, the officer prefaced his question with the phrase, "One question before you get gone," whose meaning may reasonably be interpreted as: "I need to ask you one question before you are free to go" (Id.).

In contrast to Robinette, here Officer Salas requested that defendant get back in his car, thus specifically restoring defendant to his means of leaving the scene (R. 39: 5). Further, Officer Salas neither activated a video recorder nor prefaced his additional questions with any verbiage implying that defendant

had to remain on the scene.

In addition, only a single officer was present. The record reveals no evidence that Officer Salas touched defendant, used a weapon in any way at all, spoke in an intimidating tone of voice, or otherwise engaged in a "coercive show of authority" that would provide defendant with objectively reasonable grounds to believe he was not free to go. See, e.g., Turner, 928 F.2d at 959.

The record unequivocally demonstrates that Officer Salas issued a warning citation and returned all of defendant's documentation without any coercive show of authority. At that point, the purpose of the original detention was fulfilled and the seizure, for Fourth Amendment purposes, ended. Contrary to defendant's assertions, then, the scope of the detention in this case remained within constitutional bounds. The subsequent interchange between defendant and the officer, consensual as a matter of law, accordingly does not implicate the Fourth Amendment.

POINT TWO

BECAUSE DEFENDANT CONSENTED TO THE SEARCH OF HIS VEHICLE DURING A VOLUNTARY POLICE-CITIZEN ENCOUNTER, HIS ATTENUATION ANALYSIS IS INAPPOSITE

The crux of defendant's argument is that his consent to search was the product of an illegal detention. Absent attenuation from that illegality, he contends, his consent was invalid and the nine pounds of marijuana seized as the fruit of

the consent should be suppressed. See Br. of App. at 14-16.

Defendant's argument is based on the rule of law that a consent to search, if obtained through police exploitation of a prior illegality, will only be valid if it is sufficiently attenuated from the preceding unlawful conduct. See, e.g., State v. Arroyo, 796 P.2d 684, 688 (Utah 1990). Defendant's argument fails because he premises it on the notion that he was unlawfully detained at the time he gave his consent to search. See Br. of App. at 15. Defendant does not dispute the voluntariness of his consent, arguing only that the evidence against him was obtained by exploiting a prior illegality. See Br. of App. at 6, 14.

As has been explained in Point One, the seizure, properly analyzed for Fourth Amendment purposes, objectively de-escalated into a consensual police-citizen encounter after Officer Salas issued the warning citation to defendant and returned his documentation. At that juncture, defendant was free to go. It is undisputed that the officer requested consent to search after these two events had occurred. Consequently, because there was no police illegality, there was nothing from which to attenuate defendant's consent. For this reason, defendant's attenuation argument is inapposite.

CONCLUSION

For the reasons stated, this Court should affirm the trial court's denial of defendant's motion to suppress.

RESPECTFULLY submitted this 18th day of January, 2000.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing brief of appellee were mailed first-class, postage prepaid, to Happy Morgan, attorney for defendant, Grand County Public Defender, 8 South 100 East, Moab, Utah 84532, this 18th day of January, 2000.

Joanne C. Slotnik

Addendum A

Ruling on Motion to Suppress

THE SEVENTH DISTRICT JUDICIAL COURT IN AND FOR GRAND COUNTY
STATE OF UTAH

THE STATE OF UTAH, **Plaintiff,** **vs** **ERIC SAMUEL TAYLOR** **Defendant.**	**RULING ON MOTION TO SUPPRESS** **Case No. 9917-34** **Judge Lyle R. Anderson**

The critical question in this case is whether the police officer violated defendants' rights by inquiring about defendant's travel plans. There is case authority supporting the proposition that the police may not expand the scope of a stop without reasonable suspicion of further criminal activity. It also seems to be accepted in other cases that the police do not violate an individuals rights by engaging in routine conversation.

From the evidence presented in this case, it appears that the officer gained some information before checking the drivers license. This information was gained in the course of routine friendly conversation between the driver and the officer, which the law does not prohibit. The conversation after checking the

driver's license was not routine and would be permitted only if information gathered to that point gave rise to a reasonable suspicion of criminal activity. At that point, the officer knew:

1. The driver was not from Nevada and had rented the car in Nevada.
2. The driver said he sold Microsoft computers. Microsoft does not manufacture computers.
3. There were white velvet bags on the front mirror and the rear dash.
4. There was a strong fragrance of perfume or air freshener.

This court believes it was reasonable to suspect something amiss under these circumstances. Accordingly, the officer was entitled to delay the driver to ask a few more questions. The answers to those questions did not allay the suspicion, but

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[1] Someone who actually sells computers could possibly answer this question in this way, meaning "computers that run on Microsoft software, as opposed to Apple." However, most salesmen would either name their manufacturer or say "IBM compatible".

heightened it slightly. The officer then appropriately asked for consent to search, which he received.

The motion to suppress is denied.

Dated this 7th day of July, 1999

Lyle R. Anderson, District Judge

THE STATE OF UTAH vs ERIC SAMUEL TAYLOR
CASE NUMBER 9917-34
RULING ON MOTION TO SUPPRESS

COURT CLERK'S CERTIFICATE OF MAILING/HAND DELIVERY

I hereby certify that on the 8th day of July, 1999, I mailed, postage prepaid, or hand delivered, a true and correct copy of the foregoing RULING ON MOTION TO SUPPRESS to the following:

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STATE OF UTAH
SEVENTH DISTRICT COURT

DEPUTY CLERK